Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

KEVIN K. THOMAS,
BARRY D. THOMAS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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124 pp

QUESTION PRESENTED:

WHETHER THIS COURT SHOULD ALLOW THE SIXTH CIRCUIT TO WEAKEN THE RULE OF ILLINOIS V. GATES TO ALLOW CORROBORATION OF AN ANONYMOUS LETTER BY PUBLIC, INNOCENT DETAILS RATHER THAN BY CORROBORATION OF "FUTURE ACTIONS OF THIRD PARTIES, ORDINARILY NOT EASILY PREDICTED"?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Kevin K. Thomas and Barry D. Thomas respectfully pray that a writ of certiorari issue to review the per curiam, unpublished, opinion of the Court of Appeals for the Sixth Circuit entered on August 31, 1993, and the denial of the

petition to rehear, which was entered on October 27, 1993.

OPINIONS BELOW

The Report and Recommendation of the reviewing Magistrate-Judge, dated March 16, 1992, is attached at 2a. The Memorandum Opinion of the District Judge, dated April 17, 1992, is attached at 38a.

The opinion of the Court of Appeals, reversing the Magistrate and the District Judge, is reprinted in the appendix. See App. at 52a. The order denying the petition to rehear is likewise reprinted in the appendix. App. at 77a.

JURISDICTION

The opinion of the Sixth Circuit was entered on August 31, 1993. The petition to rehear was denied in an order, dated

October 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment 4

This provision is set forth at App. 1a.

STATEMENT OF THE CASE

A. Introduction.

On March 8, 1990, the home of Kevin and Amy Thomas was searched by federal and state agents.[1] On the same day, the home of Barry and Angie Thomas was also searched by federal and state agents.[2]

Each search was conducted pursuant to a warrant issued by a part-time federal magistrate. The bulk of the information used to obtain each warrant was taken directly out of two undated, anonymous letters.[3]

The first anonymous letter was received by several different law

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[1]The correct address of this residence is 700 Adella Avenue.

[2]The address of this residence is 1018 Beverly Hills Drive.

[3]Copies of these letters are attached at pages 79a - 88a.

enforcement agencies on or about October 30, 1989. The second anonymous letter was received on or about January 23, 1990. It was not possible to determine when the anonymous letters were actually written nor whether they were both written by the same person.

Most of the information set out in the two anonymous letters consisted of innocent facts which could be readily obtained with little or no effort.

Significantly, the letters also contained predictions of the future activities of Kevin and Barry Thomas.

After receiving the second anonymous letter, an agent of the Tennessee Bureau of Investigation, in cooperation with other law enforcement officers, attempted to corroborate the two anonymous letters.

On March 8, 1990, the state agent presented an applications for two warrants,

with identical affidavits in support, to a part-time federal magistrate. The part-time magistrate issued the search warrants and they were executed the same day.

Marijuana seedlings were seized at both locations. Charges were filed against each of the petitioners under 21 U.S.C. § 841(a)(1).

B. Findings of the Reviewing Magistrate.

The reviewing magistrate, Chief Magistrate-Judge Robert P. Murrian, held a hearing on probable cause. After carefully reviewing the two anonymous letters, the affidavit and the search warrants, Magistrate Murrian issued a twenty-two (22) page Report and Recommendation. In this report he observed that the anonymous

letters contained twenty-nine (29) material allegations.[4]

Twenty of these twenty-nine allegations were not corroborated in any fashion according to the Magistrate's Report and Recommendation.

Of the remaining nine allegations, five were corroborated and four were partially corroborated. None of the corroborated items fit within the category of "future actions of third parties ordinarily not easily corroborated." Each of the corroborated items was the type of information which was readily available to the general public.

The items which the magistrate found were corroborated or partially corroborated were:

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[4]See Report and Recommendation, dated March 16, 1992, at 12a. (hereinafter "R & R").

1. Barry and Angie Thomas had been previously arrested in Knoxville for cultivating marijuana. About 100 plants were seized from their residence at that time.

2. Barry and Angie Thomas reside at 1018 Beverly Hills Drive and probably have done so since November, 1989.

3. Kevin and Amy Thomas own the property at 1018 Beverly Hills Drive.

4. Kevin and Amy Thomas own the property at 700 Adella Avenue.

5. There is a two story out-building on the property at 1018 Beverly Hills Drive.

6. The air turbine on the roof of the outbuilding at 1018 Beverly Hills Drive sometimes spins even in light wind conditions.

7. Barry and Angie Thomas own two great Danes.

8. Kevin Thomas has been a utility customer at 700 Adella Avenue since 1987.

9. There is some kind of familial, social and/or landlord/tenant relationship between Kevin Thomas and Barry and Angie Thomas.

See R & R, at pp. 20a - 21a.

The Chief-Magistrate found that although the officers had attempted to conduct a limited investigation to corroborate the anonymous letters, the investigation had serious flaws. He noted that several of the allegations made in the **anonymous** letters were actually contradicted by the officer's attempts at corroboration.[5]

The Chief-Magistrate also noted that the writer of the second **anonymous** letter specifically invited the police to corroborate certain activities that she/he

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[5]For example, a thermal imaging test conducted at one residence suggested that marijuana was being grown in an open and detached garage. This contradicted the claim in the anonymous letters that marijuana was being grown in the basement. See 26a. In another instance the anonymous informant's claim that electricity usage had increased at a particular time was contradicted when the records showed the usage had decreased. See 27a - 28a.

predicted would happen. The Magistrate then observed that:

> The affidavit makes no mention of any of this predicted behavior having been observed by the police. Thus, the affidavit is devoid of corroboration of "**future actions of third parties ordinarily not easily predicted**" which the informant invited the police to corroborate. See Gates, 462 U.S. at 245, 103 S.Ct. at 2335-2336. I find this to be a crucial omission. Visual surveillance of both premises failed to reveal suspicious activity.

R & R, at pp. 22a - 23a. (emphasis added).

The Chief-Magistrate concluded that probable cause did not exist when the warrants were issued. Specifically he found:

> Without reading the affidavit in a hypertechnical way, and giving substantial deference to the conclusion reached by the issuing magistrate judge, the undersigned concludes that the affidavit in support of these two search warrants does not demonstrate that there was a fair probability that contraband or evidence of a crime would be found at 700 Adella Avenue or 1018 Beverly Hills Drive on March 8, 1990, when these two search warrants were issued.

R & R, at p. 35a.

B. Findings of the United States District Judge.

The District Court adopted the Chief-Magistrate's report and recommendation and went further, stating that "[t]he Court does not think that this is even a close case."[6] The court characterized the affidavit in this case as "broad, speculative and conclusory" and said that it was "disturbed that warrants were ever issued on the basis of the evidence submitted to the issuing magistrate."[7]

In clear and strong language, the District Court made the following finding:

> The Court has read the application for the warrants, together with all the exhibits, and has considered them as a whole and taking them together, the Court is of the opinion that probable

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[6]Memorandum Opinion, dated April 17, 1992, at p. 7. See 49a. (hereinafter "Op. at ___a").

[7]Op. at 46a.

cause simply does not exist. No substantial evidence supports the issuing magistrate's finding of probable cause. The Court is disturbed that warrants were ever issued on the basis of the evidence submitted to the issuing magistrate. Courts do not sit to rubber stamp the actions of law enforcement officer.

Suspicion, speculation, and innuendo are piled on each other in the affidavit but the totality of the circumstances contained in it would not lead a person of reasonable prudence to believe at the time of the warrant applications that evidence of a crime would be present in the residences of these defendants. The Court characterizes the affidavit in this case as "broad, speculative and conclusory," United States v. Macklin, 902 F.2d 1320, 1326 (8th Cir. 1990). (emphasis added).

Op. at pp. 45a - 47a.

The District Court remanded the case, to the reviewing magistrate, for a good faith hearing. The Chief-Magistrate found that the government had failed to show good faith. Indeed the Chief-Magistrate found that the manner in which the agents presented the facts surrounding a test

conducted at one residence, "certainly comes awfully close to recklessness in presenting the facts." The District Court reviewed and adopted the findings of the magistrate and ordered the suppression of the items seized during the searches.

Thus both the Chief-Magistrate for the District and the District Court determined that the affidavits in question did not corroborate "future actions of third parties ordinarily not easily predicted" and that the wealth of otherwise innocent detail that was corroborated could not overcome this fatal deficiency.

C. The Sixth Circuit Opinion.

In a per curiam, unpublished opinion, a panel of the Sixth Circuit reversed the findings of the Chief-Magistrate and the District Court. Impressed with the amount of innocent detail contained in the two

anonymous letters the panel reluctantly acknowledged that "even the detailed knowledge displayed in the letters would not have been enough, standing alone, to justify issuance of a warrant..."[8] However the panel was convinced that the issuance of the warrants was justified because "much of the information amenable to corroboration was corroborated by the police."[9]

The panel was undeterred by the absence of corroboration of predicted future actions of third parties, on which the opinions of the Chief-Magistrate and

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[8]The panel dealt with the lack of detail about one residence by drawing a "natural inference" from the greater detail at the other residence. The panel failed to cite any authority for this novel "natural inference" which would seem to violate the two separate privacy interests at stake. See 70a - 72a.

[9]Sixth Circuit Opinion, dated August 31, 1993, at 71a.

the District Court had turned. The panel rejected the need for such information and stated that "corroboration of apparently innocent items is sufficient to support the issuance of a warrant when there are enough items and they are particular."[10]

Applying this expanded reading of Illinois v. Gates,[11] the Sixth Circuit then reversed the Magistrate and the District Judge, and reinstated the search warrants.

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[10] Id., at 71a.

[11] 462 U.S. 213 (1983).

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD NOT ALLOW THE SIXTH CIRCUIT TO WEAKEN THE RULE OF ILLINOIS v. GATES TO ALLOW CORROBORATION OF AN ANONYMOUS LETTER BY PUBLIC, INNOCENT DETAILS RATHER THAN BY CORROBORATION OF "FUTURE ACTIONS OF THIRD PARTIES, ORDINARILY NOT EASILY PREDICTED."

I. Introduction -- Anonymous Informants and Corroboration

Probable cause in this case turns on the efforts of the officers to corroborate the facts contained within two anonymous letters. There is no dispute that the two anonymous letters, standing alone, failed to establish the requisite probable cause for a search of these homes.

The district court and the reviewing magistrate attempted to faithfully apply the precedents of this Court to the facts of this case. They recognized that anonymous tips have always been treated with great caution because "the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable." Illinois v. Gates, 462 U.S. 213, 237 (1983). The subsequent opinion of the Sixth Circuit repudiates the wisdom of this Court in this important area.

a. Illinois v. Gates -- Anonymous Informants.

In Gates, the police had received an anonymous letter asserting that a named couple residing in a Chicago suburb were involved in drug trafficking. The anonymous letter went on to say that the couple frequently travelled to Florida to

get drugs. It stated that the wife would drive their car to Florida and would then fly back to Illinois. The husband would then fly to Florida and return the loaded car back to Illinois. The anonymous letter informed the police that the couple was getting ready to make a trip to Florida to get drugs.

Police surveillance established that the husband flew to Florida. He then went to a motel room which was registered in his wife's name. The next morning he departed with a woman and headed north on an interstate leading to Chicago.

The Gates Court noted that the anonymous letter contained a range of details relating not only to easily obtained facts and conditions which existed at the time the tip was given, but also relating "to future actions of third

parties ordinarily not easily predicted."

462 U.S. at 245. The Court observed that:

> the letter writer's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant has access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses alleged illegal activities ....
> [P]robable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story from either the Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability.

462 U.S. at 245-246 (footnotes omitted--emphasis added).

The importance of the anonymous tip being corroborated by means of police observation of activity predicted in the tip was central to the holding in Gates. See Gates, 462 U.S. at 226.

In Gates, this Court rejected the strict view that only corroboration of incriminating allegations is relevant. The Court noted that activity which might otherwise seem innocent could become suspicious in light of the anonymous information provided. 462 U.S. at 243 n. 13. But, the seemingly innocent activity to which the Court was referring was activity the anonymous informant had predicted and which the police had observed.

"Even after Gates, corroboration of a very few nonsuspicious and easily predicted events should not suffice." W. LaFave, Search and Seizure, § 3.3(f), at 687 (2d ed. 1987). As the Chief-Magistrate observed:

> Even if an affidavit contains a whole range of details, it may not be sufficient to corroborate an anonymous tip or tips. Such detail will have a bearing on judging the basis of the informant's knowledge, but is

> irrelevant to his or her truthfulness. An informant who is an accomplished liar could undoubtedly spin an elaborate lie, chocked full of easily obtained details. See United States v. Martin, 615 F.2d 318, 329 n.9 (5th Cir. 1980).

R & R, at pp. 6a - 7a.

The two anonymous letters in the present case simply were not corroborated to the extent required by Gates. As the Magistrate and District Court correctly noted, the corroboration of five allegations, and the partial corroboration of four other, pales in comparison to the corroboration in Gates in which police observed in a detailed fashion exactly the kind of trip to Florida the anonymous informant had predicted.

b. Draper v. United States -- Confidential Informants.

Gates of course involved an anonymous informant of unknown reliability. Even in

cases where this Court has reviewed information from known informants of known reliability, it has never adopted the remarkable approach suggested by the Sixth Circuit in this case. In Gates, this Court cited Draper v. United States, 358 U.S. 307 (1959), for the proposition that otherwise innocent activity might become relevant based on the corroborative efforts of the police.

The Gates Court described Draper as "the classic case on the value of corroborative efforts of police officers." 462 U.S. at 242. In Draper, a paid informant told police that the suspect had gone to Chicago the day before by train; that he would return to Denver one or two days later; that he would be carrying three ounces of heroin; that he would return during the morning hours on the train; that the suspect had a certain physical

description; that he would be wearing certain described clothing; that he would be carrying a tan zipper bag; and that the suspect always walked real fast. 358 U.S. at 309.

The police surveilled the train station and, on the second day after receiving the tip, observed a suspect alight from the Chicago train at Denver's Union Station. He met the exact physical description given by the informant, he was wearing the precise clothing described by the informant, he was walking fast and he was carrying a tan zipper bag. 358 U.S. at 309.

The informant in Draper had given this detailed description of a suspect and had predicted these future activities of the suspect. This Court held that since the police had verified all of the informant's predictions of future activities, except

the possession of heroin, there were now reasonable grounds to believe that the suspect would be carrying heroin. Draper, 358 U.S. at 313.

As the Chief-Magistrate in the present case rightly observed:

> That which was verified by police in Draper were seemingly innocent details. The details were, however, actions of a third party not easily predicted unless one knows what one is talking about. They were not details relating to easily obtained facts and conditions which existed at the time of the tip. Cf. Gates, 462 U.S. at 245; 103 S.Ct. at 2335-2336.

R & R, at p. 12a.

II. The Sixth Circuit Departure

a. The expansion of Gates.

In the decision below, the Sixth Circuit has expanded the holding of Gates in a dramatic way. The court below does not contend that the police had corroborated any "future actions of third parties ordinarily not easily predicted." Instead the Court simply finds this requirement of Gates to be unnecessary and substitutes its own test that "corroboration of apparently innocent items is sufficient to support the issuance of a

warrant when there are enough items and they are particular."[12]

The new Sixth Circuit standard repudiates the law of Gates and Draper. It eviscerates the importance of corroborating predictions of future activity as a means of determining whether anonymous informants really know what they are talking about.

Moreover it is a dangerously unworkable standard. When will there be "enough items" and what makes them "particular" enough? If a search may be justified exclusively by "enough" innocent information as long as it is "particular" do we not as a society return to the

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[12]The panel added that "[o]ther information in the letters was inculpating and non-public, such as the knowledge that there were approximately 100 plants seized in the earlier arrest." As stated earlier, the difficulty with this assertion is that nowhere in the record does anyone even suggest that this information was "non-public". The fact of the seizure and arrest was of course matters of public record.

General Warrants and Writs of Assistance that the Fourth Amendment was intended to prevent?

The ramifications of the Sixth Circuit standard are not insignificant. In the Sixth Circuit at least, every home is now subject to a search if an anonymous person contacts the local police with a tip that contains "enough items and they are particular."[13]

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[13]The fact that this new standard is set forth in an unpublished per curiam opinion heightens the importance of Supreme Court review without which the Sixth and other Circuits would be free to establish their own de facto standards which do not bear the imprimatur of this Court's authority.

III. Conclusion

As the District Court in the Eastern District of Tennessee correctly found "[s]uspicion, speculation and innuendo are piled on each other...."[14] "The government's argument merely laminates even more speculation on top of the affiant's own conclusory allegations and speculations."[15]

The Sixth Circuit has now added one additional layer of speculation and innuendo.

The difficulty of this approach has been eloquently described elsewhere. "Each of these inferences standing alone may be reasonable. But with each passing inference, the last reached is less and less likely to be true. Virtual certainty

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[14]Op. at 46a.

[15]Op. at 47a - 48a.

becomes probability, which merges into possibility, which fades into chance."[16]

This Court has previously determined that in evaluating the statements of anonymous informants it is important to corroborate "future actions of third parties ordinarily not easily predicted." The Sixth Circuit has now repudiated this holding, substituting instead a new standard in which corroboration of innocent activity is sufficient without regard to future activity as long as there are "enough items and they are particular."

No other circuit court of appeals has taken this radical approach to search warrants based on information from anonymous sources. The petitioners respectfully request that this Court grant their petition for certiorari to determine

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[16]United States v. Weber, 923 F.2d 1338, 1345 (9th Cir. 1990).

for itself whether Gates and Draper are to be expanded in this fundamental and important respect.

Respectfully submitted,

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FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

AMENDMENT 4

Unreasonable searches and seizures.-- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

IN THE UNITED STATES COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO.CR.3-92-001
	)	
KEVIN KEITH THOMAS,	)	
	)	
Defendant.	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO.CR.3-92-002
	)	
BARRY D. THOMAS,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

These cases came before the undersigned on March 5, 1992, in connection with the motions to suppress which are pending in both cases [Docs. 10]. In accordance with an agreement reached by counsel, oral arguments were entertained on

the question of whether or not there is probable cause to support the issuance of the search warrants in question. It was agreed that should the Court find that there is no probable cause to support the issuance of the search warrants, then the question of whether or not the search would nonetheless be valid pursuant to United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), would be addressed. In the event it is determined that the requirements of Leon have been met, then it is agreed that the Court will take up the issue raised in the supplemental motions to suppress dealing with Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978) (statements in an affidavit that are intentionally false or made with reckless disregard for the truth must be stricken and then whether the warrant issued on probable cause must be determined by the

affidavit with those statements excluded). Thus, the question considered herein is the purely legal question of whether or not within the four corners of the affidavit submitted in support of each of these search warrants there is sufficient probable cause to justify the issuance of the warrants.

Defendants in these cases seek to suppress evidence derived from the searches of their respective residences located at 700 Adella Avenue, Sevierville, Tennessee, and 1018 Beverly Hills Drive, Sevierville, Tennessee. The affidavit in support of the search warrant has attached to it as Exhibit 2 and Exhibit 3 two anonymous letters. The first letter was received on October 30, 1989, by the Drug Enforcement Administration (DEA) in Knoxville, Tennessee. The letter was undated. On January 23, 1990, the Knoxville DEA office

received a second anonymous letter. That letter was also undated. The style of the letter suggested that it might be from the same person or persons who sent the first letter but that has not been conclusively proved. Based upon these letters, other exhibits to the affidavit, and the application and affidavit sworn to by Gregory C. Monroe, a Special Agent with the Tennessee Bureau of Investigation, a United States Magistrate Judge of this District issued search warrants for the premises located at 1018 Beverly Hills Drive and at 700 Adella Avenue.

There is no dispute that the two anonymous letters, standing alone, fail to establish the requisite probable cause for a search of the premises. "[T]he veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable." Illinois v. Gates, 462 U.S.

213, 237 103 S.Ct. 2317, 2332 (1983). The question before this Court at present is whether or not the portions of the affidavit which describe the results of the police investigation triggered by the letters, considered in conjunction with the two letters, constitute probable cause for the searches. See Id. at 237-238; 2332.

Therefore, my primary focus will be on what, if anything, the results of the police investigation added to the information provided in the two anonymous letters. "Even after Gates, corroboration of a very few nonsuspicious and easily predictable events should not suffice." W.LaFave, Search and Seizure, § 3.3(f), at 687 (2d ed. 1987). Even if an affidavit contains a whole range of details, it may not be sufficient to corroborate an anonymous tip or tips. Such detail will have a bearing on judging the basis of the

informant's knowledge, but is irrelevant to his or her truthfulness. An informant who is an accomplished liar could undoubtedly spin an elaborate lie, chocked full of easily obtained details. See United States v. Martin, 615 F.2d 318, 325 n.9 (5th Cir. 1980).

In Gates, the anonymous letter contained a range of details relating not only to easily obtained facts and conditions which existed at the time the tip was given, but also relating "to future actions of third parties ordinarily not easily predicted." 462 U.S. at 245; 103 S.Ct. at 2335-2336.

> The letter writer's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate

> information of this type, a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses alleged illegal activities. . . . [P]robable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story from either the Gateses or someone they trusted. And corroboration of major portions of this letter's predictions provides just this probability.

462 U.S. at 245-246, 103 S.Ct. at 2336 (footnote omitted--emphasis added). This idea of the anonymous tip being corroborated by means of police observation of activity predicted in the tip is central to the holding in Gates. Id.; 462 U.S. at 226, 103 S.Ct. at 2326.

As indicated above, the truthfulness of the person or persons who authored the two anonymous letters in the instant case is "largely unknown and unknowable". Gates, 462 U.S. at 237, 103 S.Ct. at 2332. Therefore, one must try and decide if the anonymous information provided was corroborated to the degree that the probable cause standard was satisfied.

In Gates, the Court rejected the strict view that only corroboration of an incriminating allegation should be relevant. The Court noted that activity which might otherwise seem innocent could become suspicious in light of the anonymous information provided. 462 U.S. at 243 n.13, 103 S.Ct. at 2335 n. 13. But, the seemingly innocent activity to which the court was referring was activity the anonymous informant had predicted and which

the police had observed. I say this because the Court cites Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959), for this proposition and noted that "the corroborating detail established in Draper, was of entirely innocent activity. . . ." Gates, 462 U.S. at 243, n.13; 103 S.Ct. at 2335 n.13. The Court described Draper as "the classic case on the value od corroborative efforts of police officials." 462 U.S. at 242; 103 S.Ct. at 2334. In Draper, a paid informant told police that the suspect had gone to Chicago the day before by train; that he would return to Denver one or two days later; that he would be carrying three ounces of heroin; that he would return during the morning hours on the train; that the suspect had a certain physical description; that he would be wearing certain described clothing; that he would be carrying a tan zipper bag; and

that the suspect always "walked real fast." 358 U.S. at 309, 79 S.Ct. at 331.

The police surveilled the train station and on the second day after receiving the tip, the police observed a suspect alight from the Chicago train at Denver's Union Station. He met the exact physical description given police by the informant, he was wearing the precise clothing described by the informant, he was walking "fast" and he was carrying a tan zipper bag. Id. The Court held that since the police had verified every bit of the informant's information, except that the suspect would be carrying heroin, they had reasonable grounds to believe that the other detail--he would be carrying heroin--would be true. 358 U.S. at 313; 79 S.Ct. at 333. Thus, the Court held, the arresting officers had probable cause to arrest the suspect and the subsequent

search and seizure were lawful. 358 U.S. at 314; 79 S.Ct. at 333.

That which was verified by police in Draper were seemingly innocent details. The details were, however, actions of a third party not easily predicted unless one knows that one is talking about. They were not details relating to easily obtained facts and conditions which existed at the time of the tip. Cf. Gates, 462 U.S. at 245; 103 S.Ct. 2335-2336.

The anonymous letters, read in a non-technical and common sense manner, allege the following materials items:

Letter No. 1

1. Kevin Thomas, 700 Adella Drive [sic: Avenue], Sevierville, Tennessee, has or had on his premises: three 1000 watt halide lights with many HUGE marijuana plants underneath and several flourescents [sic] over literally HUNDREDS of small cuttings ready to sell and transplant!

2. Kevin Thomas' brother, Barry, and Barry's wife were arrested "last spring" with 100 plants growing in a bedroom.

3. Barry helped Kevin cultivate and harvest a BUMPER outdoor crop "this fall" from the islands of Douglas Lake.

4. Barry and Kevin are "holding now."

5. Barry is sure to "hang lamps against as soon as he is released from probation.

6. Kevin is about to harvest his "Basement Bud" and laugh all the way to the bank AGAIN.

Letter No. 2

7. Barry and Angie are at it again, this time in the workshed at their residence on Beverly Hills Drive, in Sevierville.

8. This house is owned by Kevin Thomas, Barry's brother, and Kevin's address is 400 Adella Ave. Sevierville, Tennessee.

9. Kevin is conspiring with his brother and sister-in-law to again cultivate marijuana.

10. This cultivation began just after Barry and Angie were released from unsupervised probation for a November 1988 simple possession conviction resulting from a May 1988 arrest for cultivation (newspaper clipping attached).

11. Barry and Angie received record expungement after successful completion of their probation period.

12. During their probationary period of 11 months 29 days in the summer of 1989 Barry and Angie cultivated marijuana along with Kevin Thomas on the islands of Douglas Lake.

13. Kevin also grows pot in his basement.

14. Barry and Angie obtained the cuttings from the marijuana growing in Kevin's basement to maintain their continuing criminal enterprise.

15. The workshed at the Beverly Hills address is not attached to Barry and Angie's home and is outside the curtilage.

16. If someone approached the workshed they might well smell marijuana or hear the

hum of high intensity lights.

17. Barry and Angie plan to install an air conditioner and you will see that it runs even when the weather is freezing.

18. An air turbine on the roof of the workshed turns at high speeds even in the calmest of winds and freezing temperatures.

19. Black plastic covers the windows of the workshed to prevent bright lights form leaking through.

20. The electricity consumption at the Beverly Hills address is much higher than normal for the area.

21. The electricity consumption at the Beverly Hills address is much higher than last year and this is attributable to grow lights being used.

22. Kevin shut his marijuana growing operation down last year when Barry and Angie were arrested.

23. Aerial surveillance using head detectors would reveal high levels of heat loss from the workshed.

24. Barry and Angie dispose of the waste from their marijuana operation at landfills or commercial dumpsters and are too smart to put it in their own trash.

25. Barry and Angie use a certain hydroponic medium, Pro-Mix BY soilless mix, purchased at Knox Seed Supply, packaged in 80 lb bales and if you watch, you will see them carry them from their car to the workshed.

26. Ground surveillance would show Kevin entering the workshed ("greenhouse") at the Beverly Hills address.

27. Barry and Angie own great danes.

28. Barry and Angie's first harvest of marijuana is expected no sooner than the middle of February and no later that late March.

29. Barry and Angie expect to harvest every three months after that.

What was corroborated regarding these 29 items of information?

Item 2 was partially corroborated. On May 15, 1988, Barry D. Thomas and Angela Thomas were arrested for cultivating and growing marijuana according to Knoxville Police Department records. About 100 marijuana plants were seized according to police records. The fact of the arrests was in the newspaper. The fact that about 100 marijuana plants were seized was not. The "last spring" reference in the first letter is unexplained.

Records from the Sevier Electric Company corroborated items 1, 7, and 8, partially, i.e., the utility service at 700 Adella Drive (sic: Avenue) and Beverly Hills, Lot 22 was in the name of Kevin Thomas and Angie Thomas, respectively. Cars seen by police on the Beverly Hills Drive property were registered to Barry and Angela Thomas.

Item 8 is corroborated because property records show that Kevin Thomas and his wife own the property at Lot 22, Beverly Hills Subdivision, at 1018 Beverly Hills Drive.

Items 1 and 8 are partially corroborated in that property records show that Kevin Thomas and his wife own the property at 700 Adella Avenue. Sevier County Electric System records show that Kevin Thomas is the name on the account at 700 Adella Avenue. A car registered to him was seen on the property during police surveillance.

Item 10 is corroborated to the extent that police records showed that Barry and Angie were arrested in May 1988 for cultivating and growing marijuana. But, that information was public knowledge because of the press coverage.

Item 15 is partially corroborated. Exhibit 1C to the affidavit shows a picture of a two story outbuilding "located on the curtilage" of the residence at 1018 Beverly Hills Drive.

Item 18 is partially corroborated. The affiant saw an air turbine on the outbuilding at 1018 Beverly Hills Drive. Affiant stated that he saw the turbine spinning rapidly on February 3, 1990 "regardless of wind conditions." He says there was very little to no wind that day. Nothing is said, however, about the temperature.

Item 27 is corroborated. The affiant saw to Great Danes on the property at 1018 Beverly Hills Drive.

On March 5, 1990, a named law enforcement officer (not the affiant) used a hand-held thermal imaging device to surveil [sic] the property at 1018 Beverly

Hills Drive. The affiant stated: "The outbuilding located on the curtilage of the residence at 1018 Beverly Hills Drive had a slightly brighter white image than the residence located at 1018 Beverly Hills Drive. Two other shed-type outbuildings located in that neighborhood were dark and produced no white image whatsoever in the screen of the thermal imaging device." This tends to corroborate items 7 and 23.

There is no corroboration whatsoever for the following items: 3, 4, 5, 6, 9, 11, 12, 13, 14, 16, 17, 19, 20, 21, 22, 24, 25, 26, 28, and 29.

The corroborated items are: (1) Barry and Angie Thomas had been arrested in Knoxville for cultivating marijuana, (2) about 100 marijuana plants were seized from their residence at that time, (3) Barry and Angie Thomas reside at 1018 Beverly Hills Drive and probably have done so since

November, 1989 based on utility records, (4) Kevin Thomas and his wife own the property at 1018 Beverly Hills Drive and have done so since 1987, (5) Kevin Thomas and his wife own the property at 700 Adella Ave., (6) there is a two-story outbuilding on the property at 1018 Beverly Hills Drive, (7) the air turbine on the roof of the outbuilding at 1018 Beverly Hills Drive sometimes spins even in light wind conditions, (8) Mr. and Mrs. Barry Thomas own two Great Danes, (9) Kevin Thomas has been a utility customer at 700 Adella Avenue since 1987; (10) there is some kind of familial, social and/or landlord/tenant connection between Kevin Thomas and Barry and Angie Thomas.

All of these corroborating items fall into the category of easily obtainable facts which were available at the time the letters were apparently written. The only

exception might be the assertion by the informant that 100 plants were found in the Barry Thomas' residence when Barry and Angie were arrested. But, even that information has nothing to do with the future actions of anyone. None of the corroborated information does. As indicated above, the corroboration of actions which have been predicted by an informant were key elements in the probable cause findings in Draper and Gates.

The writer of the second anonymous letter in the instant case invited the police to corroborate predicted activities of Kevin, Barry, and Angie Thomas. See Items 16, 17, 23, 24, 25, 26, 28, 29. The affidavit makes no mention of any of this predicted behavior having been observed by the police. Thus, the affidavit is devoid of corroboration of "future actions of third parties ordinarily

not easily predicted" which the informant really invited the police to corroborate. See Gates, 462 U.S. at 245, 103 S.Ct. at 2335-2336. I find this to be a crucial omission. Visual surveillance of both premises failed to reveal suspicious activity.

Finally, one must look at which the police were able to find out independently of the tip and in addition to the rather innocuous details from the letters which they were able to corroborate. After all, the question of probable cause is to be judged under the totality of the circumstances.

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information,

> there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing] that probable cause existed.

Gates. 462 U.S. at 238-239, 103 S.Ct. at 2332 (citation omitted). And so, now I turn to the circumstances set forth in the affidavit which I have not previously discussed.

Perhaps the strongest piece of evidence is the March 5, 1990, surreptitious monitoring by a police officer of the workshed at the Beverly Hills Drive premises. This was done with a hand-held thermal imaging device. The affidavit states, in relevant part, as follows:

> On March 5, 1990, at approximately 11:30

> p.m., Special Agent Poag conducted surveillance of the residence located at 1018 Beverly Hills Drive and the outbuilding contained on the curtilage of that residence. Again, Special Agent Poag utilized the hand-held thermal imaging device. The outbuilding located on the curtilage of the residence at 1018 Beverly Hills Drive had a slightly brighter white image than the residence located at 1018 Beverly Hills Drive and surrounding residences. Two other shed-type outbuildings located in that neighborhood were dark and produced no white image whatsoever in the screen of the thermal imaging device.

Exhibit 1C to the search warrant is a photograph of the outbuilding. There are no power lines going into that building. The magistrate may have assumed the lines were underground. There is an

electrical weather head on the residence evidencing above ground power to the residence. How likely is it that above ground power would be put into the residence but below ground power put into a shed? In any event, electrical power would have been necessary to power the grow lights mentioned by the informant.

In the paragraph just preceding the one set out above, the affiant states that the thermal imaging device showed a "brighter white image" when directed to the detached garage at 700 Adella Avenue than when directed at the residence there and other nearby residences. This reading was taken about 15 minutes before the reading on the outbuilding at 1018 Beverly Hills Drive. The reading taken on the detached garage at 700 Adella Avenue contradicts the informant's assertion that "Kevin also grows pot in his basement. . . ."

Also, the informant advised in the second letter that "electricity consumption is much higher than normal for the area, and much higher than last year at the same location . . . attributable only to the use of grow lights." From the context of the letter, the writer is speaking of the Beverly Hills Drive premises. The affiant never tried to establish what a "normal" consumption of electricity for the area would be. Attached to the affidavit were utility records based on readings taken at the 700 Adella Avenue premises and the Beverly Hills Drive premises on January 2, 1990, and March 1, 1990. Exhibit 4 to the Affidavit.

If "at the same location" means 1018 Beverly Hills Drive, and if we assume the second anonymous letter was written in January, 1990 (affiant states that it was

received by law enforcement officers on January 23, 1990) and if we assume "last year" means January 1989, the exhibit contradicts the informant. Meter usage in January 1989 was 3130 and it was 2560 in January 1990. Figures for 1988 were not supplied to the magistrate.

The affiant indicates that the electricity use for the months of August through November for each house was higher than for the January 1990 reading covering the month of December 1989. Affiant states in relevant part:

> The bill for January, 1990, covered a period of thirty-three days, which would have been the month of December, 1989 was an extremely cold month with record breaking low temperatures set in several areas in the Southeast including East Tennessee. As demonstrated on the printouts attached as Exhibit 4, the electric utilities for August,

> September, October and November 1989 for both residences were higher than for the January 1990 reading covering the month of December 1989. This is consistent with the growing of marijuana indoors using electricity during the months of July, August, September, October and November.

The final sentence is conclusory and is a "bare bones" assertion condemned by Gates. 462 U.S. at 239, 103 S.Ct. at 2333. According to the affiant, electricity usage is determined by looking at the next month's reading (". . . for the January 1990 reading covering the month of December 1989.") Using this approach, electrical consumption at the two residences for August 1989 through February 1990 was as follows:

	700 Adella Av.	1018 Beverly Hills
Aug	2103 KWH	3520 KWH

Sep	4077 KWH	4010 KWH
Oct	2698 KWH	3080 KWH
Nov	1572 KWH	100 KWH
Dec	1429 KWh	2560 KWH
Jan	1792 KWH	2240 KWH
Feb	3340 KWH	1820 KWH

If it is assumed that December was an extremely cold month with record breaking temperatures, the December 1989 usage at 700 Adella Avenue was about like November's. At 1018 Beverly Hills, December's usage shot up 2460 KWH over November's. Fluctuations in electricity usage may be caused by several things, e.g., variable East Tennessee weather, residents on vacation for all or part of the month, utilization of oil heat in winter and electric air conditioner in summer, use of natural gas or propane or kerosene heaters during winter and electric

air conditioners in the summer. The affiant's conclusion drawn from Exhibit 4 that the electrical consumption at each residence was consistent with growing marijuana does not follow reasonably or logically from the facts asserted. A more helpful comparison would have been to electricity consumption at residence near to and comparable to the ones in question, I also note that the affiant stated incorrectly the "last reading date on both residences was January 2, 1990." The "reading date" on two of the three documents in Exhibit 4 is March 1, 1990. The affidavit also states that Exhibit 4 consists of copies of printouts from Sevier Electric Company for the two residences between January 1989 and January 1990. That is incorrect. The readings span January 1989 to March 1990.

The affiant states that two packages weighing forty pounds each were sent from Superior Growers Supply, Inc., to "Richard Spence" on June 21, 1989, at 1018 Beverly Hills, Sevierville, Tennessee. Superior-Growers Supply, Inc., advertises in High Times magazine for the sale of halide lamps and other devices used to grow indoor plants. See Exhibit 7. All of the information in the affidavit and exhibits thereto reflect that Barry and Angie Thomas moved to 1018 Beverly Hills Drive in November 1989. Therefore, the shipment of the two packages to "Richard Spence" in June 1989 is stale information having little to do, if anything, with any alleged criminal activity on the part of Kevin, Barry, and/or Angie Thomas. Kevin Thomas owned the property but that does not indicate that he had any connection with the shipment. There must be probable cause

to believe that property constituting evidence of criminal activity, contraband, the fruits of a crime, things otherwise criminally possessed or property which is designed or used in committing an offense is presently on the premises to be searched. See Rule 41(b), Fed.R.Cr.P.; see generally, W. LaFave, Search and Seizure § 3.7(a) (2d ed. 1987). "Richard Spence" may have rented the premises from Mr. and Mrs. Kevin Thomas, but that hardly sheds light on what was happening on the premises when the search warrants issued.

An air turbine that tends to spin rapidly at times regardless of wind conditions and from which the police thought they may have seen light emanating at 7:00 or 8:00 P.M. on a winter evening proves little. When it was seen spinning at about mid-day on February 3, 1990, in light wind conditions, the reason could

have been solar heating of the interior of the shed and consequent spinning of the turbine as the warmer air escaped to the outdoors. It is no more probable that some other heat source was casing the spinning. The absence of power lines to the shed raises some doubt about whether not the "light" emanating from the turbine might have been a reflection. Exhibit 1C to the warrant for 1018 Beverly Hills Drive seems to indicate that it is a metallic turbine ventilator.

The fact that the writer states in the first letter that he is a "disgruntled customer who has seen it all first hand" is entitled to consideration regarding the basis of the affiant's knowledge. "Basis of knowledge" and veracity of the informant remain "highly relevant" considerations. Gates, 462 U.S. at 230, 103 S.Ct. at 2328. But, the

statement says nothing about the informant's veracity. It certainly is not against his penal interest since the letter was not signed.

Without reading the affidavit in a hypertechnical way, and giving substantial deference to the conclusion reached by the issuing magistrate judge, the undersigned concludes that the affidavit in support of these two search warrants does not demonstrate that there was a fair probability that contraband or evidence of a crime would be found at 700 Adella Avenue or 1018 Beverly Hills Drive on March 8, 1990, when these two search warrants issued.

Accordingly, this matter should be set for further hearing before the undersigned regarding whether or not United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) would allow the fruits of the

searches to be introduced into evidence despite the lack of probable cause to support the search warrants.[1]

It is therefore RECOMMENDED that the defendants' motion to suppress be sustained to the extent that the probable cause did not exist to support the issuance of the search warrants in question, and it is RECOMMENDED that the matter be re-referred to the undersigned for further proceedings consistent with this report and recommendation.[2]

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[1] The Supplemental Motions to Suppress raise Franks v. Delaware, 438 U.S. 174 98 S.Ct. 2674 (1978), issues and need only be reached if the searches should be sustained pursuant to United States v. Leon.

[2] Any objections to this Report and Recommendation must be served and filed within ten (10) days after service of a copy of this recommended disposition on the objecting party. Failure to file objections within the time specified waives the right to appeal the District Court's order. Thomas v. Arn, 474 U.S. 1 40, 106 S.Ct. 466 (1985).

Respectfully submitted,

Robert P. Murrian
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO.CR-3-92-01
	)	
KEVIN KEITH THOMAS,	)	
	)	
Defendant.	)	

and

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO.CR-3-92-02
	)	
	)	
BARRY D. THOMAS,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

These are two separate criminal actions that have been consolidated for certain pretrial purposes. The defendants are brothers charged with manufacturing a

controlled substance in violation of 21 U.S.C. § 841(a)(1). [Doc. 1 in both cases.] Motions to suppress certain evidence obtained as a result of searches conducted on their residences have ben filed by the defendants [docs. 10, 10A in both cases] and on March 16, 1992, Magistrate Judge Robert P. Murrian entered a report and recommendation [doc. 30 in CR-3-92-01 and doc. 29 in CR-3-92-02] in which he concluded that affidavit in support of the warrants issued in these cases failed to establish probable cause and thus recommended that the evidence obtained as a result of the searches conducted pursuant to these warrants be suppressed. On March 26, 1992, the United States filed appeals from Magistrate Judge Murrian's report and recommendation [doc. 31 in CR-3-92-01 and doc. 30 in CR-3-92-02] and subsequently filed a memorandum in support

of its appeals [doc. 32 in CR-3-92-01 and doc. 31 in CR-3-92-02]. The Court will not extensively recite the facts regarding the warrants in these cases in light of the thorough summary of the facts provided by Magistrate Judge Murrian's excellent report and recommendation in these cases.

At the time of the searches, these defendants maintained separate residences in Sevierville, Tennessee. Kevin Thomas lived at 700 Adella Avenue and his brother, Barry, lived at 1018 Beverly Hills Drive. The investigation into their activities was initiated as a result of two undated anonymous letters sent to the Drug Enforcement Administration (DEA). One was received by the DEA on October 30, 1989, and the other was received on January 23, 1990. One of the letters states that it was "a tip from a disgruntled customer." The letters described the alleged

activities of the defendants in growing marijuana in the basement of Kevin Thomas' house and in a shed on the property of Barry Thomas. Whether the letters were written by one person or by two different people is pure speculation.

Gregory C. Monroe, a Special Agent of the Tennessee Bureau of Investigation, and other law enforcement officers undertook an investigation of the Thomas brothers in an attempt to corroborate the information in the letters and otherwise to attempt to obtain sufficient evidence to apply for a search warrant. As a part of this effort, as stated in Mr. Monroe's affidavit in support of the warrant application, on March 5, 1990, he and another officer "conducted surveillance from a public area of the

residence located at 70 Adella Drive,"[3] using a hand-held thermal imaging device, and found that a detached garage at this location appeared to produce a brighter image than the residence at 700 Adella Drive or the other residences located nearby. The same device was used to determine that the shed on the property at 1018 Beverly Hills Drive also produced a brighter image than the residence at that address or other residences nearby.

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[3] The Court is not sure what this phrase means; however, the Court notes that law enforcement officials are not privileged to trespass upon private property and no part of a person's property is "public." See Sneed v. State, 423 S.W.2d 857, 860 (Tenn. 1967); Hughes v. State, 141 S.W.2d 477, 480 (Tenn. 1940); Chadwick v. State, 429 S.W.2d 135, 139 (Tenn.Crim.App. 1968). If these officers trespassed upon the defendant's property, the evidence obtained as a result would be excludable. See Silverman v. United States, 81 S.Ct. 679 682 (1961). The open fields doctrine would have no application in this case.

In the course of surveillance of the defendant's residences, the agents observed a number of innocent activities, including light emanating from a ventilator on top of the shed at the Beverly Hills address, while the bottom story was dark, "which suggests that the top floor and bottom floor are completely separate, and the top floor has lights inside," vehicles belonging to the defendants, the defendants or their wives visiting each other, the movement of a charcoal grill from the Beverly Hills Drive shed to the house and back within a fifteen minute period, about which "[i]t was Agent Persinger's opinion that the female did not have time to use the grill to cook any food on it," the rapid spinning of a ventilator fan on the roof of the shed at the Beverly Hills Drive address on a day when little wind was blowing, and a person carrying garbage bags

"containing an unknown material" from the house to the shed at the Beverly Hills address. Mr. Monroe also stated in his affidavit that from his experience in law enforcement and his reading of books and magazine articles, such as those in High Times, a magazine dedicated to articles about marijuana cultivation, he was familiar with the techniques used by indoor marijuana growers. In addition, exhibits were attached to the warrant application. These exhibits included electric bills for the two addresses, deeds showing the ownership of the property, and copies of articles from High Times.

The government makes two basis contentions in this appeal: it argues that Magistrate Judge Murrian used an inappropriate standard of review and that he applied an inappropriate analysis in assessing the factual allegations contained

in the affidavit filed in support of the warrant application. More specifically, the government contends that Magistrate Judge Murrian failed to assess the "laminated whole"[4] of the evidence in support of the warrant in considering whether a substantial basis existed for the issuing magistrate's determination of the existence of probable cause and failed to give sufficient deference to the issuing magistrate's decision. It also argues that Magistrate Judge Murrian analyzed the warrant in a hyper-technical manner rather than a common sense fashion.

The Court has read the application for the warrants, together with all the exhibits, and has considered them

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[4] The Court does not understand the rather poetic phrase "laminated whole" and prefers the standard established by the Supreme Court, the totality of the circumstances.

as a whole and taking them together, the Court is of the opinion that probable cause simply does not exist. No substantial evidence supports the issuing magistrate's finding of probable cause. The Court is disturbed that warrants were ever issued on the basis of the evidence submitted to the issuing magistrate. Courts do not sit to rubber stamp the actions of law enforcement officers.

Suspicion, speculation, and innuendo are piled on each other in the affidavit but the totality of the circumstances contained in it would not lead a person of reasonable prudence to believe at the time of the warrant applications that evidence of a crime would be present in the residences of these defendants. The Court characterizes the affidavit in this case as "broad, speculative and conclusory," United States

v. Macklin, 902 F.2d 1320, 1326 (8th Cir. 1990). The Court does not find that Magistrate Judge Murrian engaged in a piecemeal or hypertechnical analysis of the affidavit and rather his method of analysis is not substantially different from that of the Sixth Circuit in United States v. $67,220.00 in United States Currency, No. 91-5645 (6th Cir., February 28, 1992).

Simply put, too much speculation, particularly about the defendants' activities, much of which that was observed by the affiant or other agents was entirely innocent, is required to support the finding of probable cause. Magistrate Judge Murrian correctly noted the speculative and conclusory nature of this affidavit. The affidavit contains a number of loose ends, such as inadequate and inconclusive comparisons of electricity usage at these houses. The government's

argument merely laminates even more speculation on top of the affiant's own conclusory allegations and speculations. Moreover, one of the anonymous letters is from an allegedly "disgruntled" customer, which reveals a bias, grudge, or prejudice that could have motivated the tip.

Warrants are not issued upon mere suspicion, which is the best that can be said of the totality of the circumstances found in the affidavit and supporting exhibits.

> "Although the Court readily concedes that probable cause is not a game of certainties, it resists any effective characterization as a game of speculation. Only upon such speculation, however, can the warrant in question ... be said to create a fair probability that [evidence] could be found on the defendant['s] property. The affidavit consists ... of uncorroborated

> accounts of events ... and of an incomplete trail of evidence that can only speculatively be said to support a finding of probable cause ... ."

United States v. One Parcel of Property at 18 Perkins Road, 774 F.Supp. 699, 704 (D. Conn. 1991). The Court does not think that this is even a close case. No probability of criminal activity is sufficiently demonstrated.

Examining the affidavit with "'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,'" Massachusetts v. Upton, 104 S.Ct. 1085, 2085 (1984), without divorcing the facts alleged in the affidavit from each other, the Court can only conclude that probable cause does not exist and no warrant should have been issued. While a preference

exists for searches conducted upon the authority of a warrant, the Fourth Amendment does not permit searches in these circumstances, with or without warrants, on less than probable cause.[5]

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[5] As Justice Grafton Green of the Tennessee Supreme Court observed in Cravens v. State, 256 S.W. 431, 432 (Tenn. 1923),

> "[t]he history of our ancestors for 300 years has demonstrated that police officers cannot be permitted to ransack at will the properties of the people. Intolerable conditions have always followed such practices. A revolution in England and the revolution of the American colonies are said by high authorities to have been largely influenced by promiscuous seizures and searches of the houses and effects of the people -- efforts by the constituted authorities to procure evidence of the violation of regulations deemed wise by those in power, but unpopular with many,

(continued...)

Accordingly, the Court OVERRULES the objections of the United States [doc. 31 in CR-3-92-01 and doc. 30 in CR-3-92-02] to the report and recommendation of Magistrate Judge Robert P. Murrian [doc. 30 in CR-3-92-02 and doc. 29 in CR-3-92-02] and ADOPTS this report and recommendation as a part of this Court's opinion. This case is REMANDED to Magistrate Judge Murrian for further proceedings consistent with his report and recommendation.

ENTER:

LEON JORDAN
United States District Judge

[5](...continued)
and constantly
transgressed."

Nos. 92-6207/6208

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellant,	)ON APPEAL
	)FROM THE
v.	)UNITED STATES
	)DISTRICT
	)COURT FOR THE
KEVIN KEITH THOMAS (92-6207),	)EASTERN
	)DISTRICT OF
	)TENNESSEE
BARRY D. THOMAS (92-6208),	)
	)
Defendants-Appellees.	)

BEFORE: **RYAN** and **BOGGS**, Circuit Judges; and **ROSEN**, District Judge.[6]

PER CURIAM: The government, in an interlocutory appeal, seeks to have evidence seized during the execution of two search warrants for the residences of Kevin

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[6] The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Keith Thomas and Barry D. Thomas admitted in the criminal proceedings against them. The district court held both that there was insufficient probable cause in the search warrant affidavit and that the government could not avail itself of the good faith exception to the exclusionary rule. For the reasons given below, we reverse.

I

On March 8, 1990, two search warrants were issued, one for 700 Adella Drive[7] and one for 1018 Beverly Hills Drive. The warrants were executed that day and returned on March 9.

On January 6, 1992, Kevin Thomas was charged in federal court in a three-count information: count I was for manufacturing marijuana in March 1990, in

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[7] Defense counsel points out that the Kevin Thomas residence was at 700 Adella Avenue.

violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Count II charged that any and all interest Kevin Thomas had in real property at 700 Adella Drive was forfeited to the government by virtue of the marijuana manufacturing alleged in Count I. Count III charged that Kevin Thomas's interest in the real property at 1018 Beverly Hills Drive was also forfeited to the government by virtue of the marijuana manufacturing alleged in Count I. Also on January 6, Barry Thomas was charged in a one-count information with manufacturing marijuana in March 1990, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

On February 10, 1992, both Thomases filed motions to suppress the evidence seized from the residences. After a hearing on the motion to suppress, a United States magistrate judge recommended that the evidence be suppressed because

there was insufficient probable cause to support the issuance of the warrants. Overruling government objections to the report, the district judge adopted the magistrate judge's report and recommendation. He then referred the matter back to the magistrate judge to determine whether the evidence was admissible under the good faith exception to the exclusionary rule, United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984).

The magistrate concluded that the government had failed to show objective good faith. Thus, he recommended that the evidence be suppressed. Once again the government objected, and once again the district judge adopted the recommendation. The government appealed.

II

The search warrant was based on the following information. On October 30,

1989, an anonymous letter was sent to the Knoxville, Tennessee office of the Drug Enforcement Agency (DEA).[8] The text of the letter stated:

> ABC News just featured a 46-state bust of indoor marijuana growers (mentioning a check of utility bills); "48 Hours" recently featured the use of aerial infra-red surveillance in arresting an indoor grower.
>
> Here's a tip from a disgruntled customer who has seen it all first-hand" three 1000 watt halide lights with many HUGE marijuana plants underneath and several flourescents [sic] over literally HUNDREDS of small cuttings ready to sell and transplant! Anyone care to see for yourself?
>
> Kevin Thomas
> 700 Adella Av.
> Sevierville, [sic] TN

[8] The letter was also copied by "cc" to other law enforcement agencies.

> His brother Barry, who with his wife was arrested in Knoxville last spring with 100 plants growing in a bedroom, helped Kevin cultivate and harvest a BUMPER outdoor crop this fall from the islands of Douglas Lake; they are both holding now, and Barry is sure to hang lamps again as soon as he's released from probation.
>
> Kevin is about to harvest his "Basement Bud" and laugh all the way to the bank AGAIN. He thinks he lives in Mayberry RFD: "What are they gonna do...send Barney out here with a bullet?"

On January 23, 1990, a second undated anonymous letter was received in the DEA office. That letter stated:

> Barry and Angie are at it again, this time in the workshed at their residence on Beverly Hills Dr. in Sevierville; this house

is owned by Barry's brother

Kevin Thomas
400 Adella Av.
Sevierville, TN[9]

Kevin is conspiring with his brother and sister-in-law to again cultivate marijuana, just after Barry and Angie were released from unsupervised probation for a November 1988 simple possession conviction resulting from a May 1988 arrest for cultivation (see enclosed newspaper clippings)---the pair even received record expungement after the successful completion of their probation period (11 months 29 days), during which time (the summer of 1989) they boldly cultivated marijuana on the islands of Douglas Lake with kevin Thomas!

Kevin also grows pot in the basement, from which Barry and Angie obtained the cuttings

---

[9] 700 Adella Av., the address in the first letter, was correct.

to maintain their continuing criminal enterprise. Since Kevin owns the property and they succeeded in bringing in a record harvest last summer--- despite the fact they were caught red-handed in Knoxville---Barry and Angie feel they can break the law with impunity.

These criminals' bravado will suffice to do them in should this tip prompt you gentlemen to initiate an investigation, since their deluded egomania ignores such facts as:

the workshed is unattached to their home, placing it outside the curtiledge of the residence-- permission from their neighbor to approach the same might well result in the detection of the pungent of flowering (an officer with experience and/or a trained canine), or hear the hum of high intensity discharge lamp ballasts in operation (tax assessors need no

permission to
tresspass) [sic];

they have plans to
install an air
conditioner, which
would be in operation
during freezing outside
temperatures;

there is an air turbine
installed upon the
workshed roof to
evacuate heat and
moisture, turning at
high speeds even in the
calmest of winds and in
freezing temperatures;

black plastic clearly
covers the window to
prevent the bright
lights from leaking
through;

the electricity
consumption is much
higher than normal for
the area, and much
higher than last year
at the same location
(Kevin shut down this
operation site
immediately upon Barry
and Angie being
arrested), attributable
only to the use of grow
lights;

infra-red heat
detection aerial
surveillance will show

high levels of heat loss from a supposedly unoccupied building, which can only result from hot grow lights and transpiration of growing plants;

after transplanting and harvesting, they must dispose of waste materials (unmarketable stems and root systems)--while they are wise enough not to put these materials out for garbage pickup, they don't think they are "hot" enough to be followed while transporting the same and depositing it in a landfill or, more likely, in a commercial dumpster;

their hydroponic medium of choice is Pro-Mix BX soiless [sic] mix, purchased at Knox Seed Supply in Knoxville, packaged in black 80 lb. bales---these are large containers which must be carried in plain sight from their auto, across their yard, and into their workshed for use; ground surveillance would show Kevin also entering the

"greenhouse," which should not only result in another conviction but also in another warrant to search his primary residence and charge his wife for their basement garden--forfieture (sic) of both homes necessarily follows.

Surely you have additional methods to collect evidence to show probable cause for a search warrant, and just as surely you know how best to compile the same to make it stand up in court so that these criminals' civil liberties are not infringed upon in the process.

Their first harvest since Barry, Angie, and their Great Danes moved in is expected no sooner than the middle of February and no later than late March: they expect to harvest every three months after that.

Good hunting!

The following information was either corroborated by the police or developed independently.

1) The Adella property had been transferred to Kevin and Amy Thomas on September 23, 1987. Electric company records showed the service for the Adella home was in the name of Kevin Thomas. The telephone directory listed Kevin Thomas at 700 Adella.

2) The Beverly Hills property was transferred in 1983 to Kevin Keith Thomas and Amy Sue Thomas. The electric company showed service at that address in the name of Angie Thomas as of November 27, 1989. Prior to that

date, Kevin Thomas had electric service at that address.

3) The electric bills were obtained and attached to the affidavit. They showed that the August, September, October, and November 1989 bills for both residences were higher than for the January 1990 reading, which covered the month of December 1989. Furthermore, December 1989 was an extremely cold month with record-breaking low temperatures in East Tennessee. Tennessee Bureau of Investigation Special Agent Monroe (the affiant) claimed in the affidavit

that such a pattern was consistent with an indoor growing operation. The electrical usage did not show reasonable seasonal variations. Furthermore, usage was abnormally high. For example, for several months at the Beverly Hills property the usage was consistently over 3,000 kilowatt hours per month.

4) Surveillance of the Beverly Hills property revealed a two-story beige outbuilding with a brown roof. On top of the roof was a rotating ventilator shaft that appeared to let warm air escape from the building. The officer said that it was

rotating even in still air, and his inference was that the building was used to grow marijuana. There was also a dog pen with two Great Danes on the property. Two vehicles, one registered to Barry D. Thomas and one registered to Angela Thomas, were parked in front of the house. Officers also noticed a white female drive the vehicle registered to Angela thomas, and later noticed the same vehicle parked at the Adella property.

5) Surveillance of the Adella property revealed a vehicle registered to Kevin K. Thomas.

6) Using a hand-held thermal imaging device, a DEA agent determined that the detached garage at the Adella property had a brighter white image than either the residence on that property or than other residences located nearby. The agent also determined that the outbuilding at the Beverly Hills address also produced a brighter white image than either the residence on the property or than other residences located nearby. Higher levels of heat produce brighter white images on the device than do lower levels of heat.

7) Barry and Angie Thomas had been arrested on May 15, 1988 and charged with cultivating and growing marijuana. Arrest reports indicated that 100 marijuana plants had been found growing in their residence in Knoxville. Public information in newspaper articles had not mentioned the number of plants recovered, although the October 30 anonymous letter said they had been caught with 100 plants in the bedroom.

8) Two packages of unidentified supplies were sent from Superior Growers Supply to the Beverly Hills address.

The shipping name used was Pence,[10] though there was no one by that name listed in the Sevierville telephone directly as of January 30, 1990.

III

We review the district court's legal conclusion de novo. Because no oral or other supplemental information was provided to the magistrate, the probable cause analysis is limited to the four corners of the affidavit. Whitley v. Warden, 401 U.S. 560, 565 n.8 (1971); Aguilar v. Texas, 378 U.S. 108, 109 n.1, 84 S.Ct. 1509, 1511 n.1 (1964).

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[10] The warrant affidavits show the name of Richard Spence, but the actual shipping record showed the material going to Pence. Agent Monroe testified that he had made an error in checking the records and preparing the affidavits.

When a magistrate reviews a warrant request, he must determine whether, under the totality of the circumstances, there is probable cause to issue the warrant. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983). When the government uses an anonymous letter as part of the basis for the probable cause, it must corroborate the reliability of that letter. Great deference should be accorded the magistrate who issues the warrant. Massachusetts v. Upton, 466 U.S. 727, 733, 104 S.Ct. 2085, 2088 (1984).

In this case, thee were very specific allegations made in the two letters. It was not clear whether the letter-writers in both cases were the same person, but both letters were extremely specific. The letters implied a substantial familiarity with the operations at both Thomases' residences. Though even

the detailed knowledge displayed in the letters would not have been enough, standing alone, to justify issuance of a warrant, much of the information amenable to corroboration was corroborated by the police.

A number of corroborated items were seemingly innocent. But corroboration of apparently innocent items is sufficient to support issuance of a warrant when there are enough items and they are particular. Other information in the letters was inculpating and non-public, such as the knowledge that there were approximately 100 plants seized in the earlier arrest.

The evidence for searching the residence on Beverly Hills Drive was less specific and substantial than that for the Adella residence. However, the government rightly argues that the volume and specificity of the information on the

Adella residence makes the requirement for the information on the Beverly Hills less stringent. This can be compared with the use of information from a confidential informant (CI) with a good track record. With a proven, reliable CI, warrants can properly issue on very little additional information. The warrant issues in large measure on the basis of the informant's track record. In this case, the information for the Adella residence was good, specific, and corroborated, creating a natural inference that the information on the Beverly Hills residence was equally reliable.

Defendants claim that there were several statements in the anonymous letters that either were refuted by the officers' observations or that were amenable to corroboration but were not in fact corroborated. But the officers need not

verify each and every statement in the letters for a magistrate to find probable cause. Nor does every single statement need to be accurate, so long as the general reliability of the tipster is confirmed, and the officers made no material misrepresentations or omissions before the magistrate that affected the judgment on probable cause. In this case, looking at the totality of the circumstances, and particularly when giving deference to the issuing magistrate, there was more than enough probable cause to support the issuance of the warrant.

Finally, the defendants claim the information was stale and that therefore the warrant should not have issued. Different offenses have different periods of time in which the government can act on information before it is considered stale. A marijuana growing operation, in which the

marijuana must grow to maturity and then be harvested, has a longer lifetime of relevant data than a cocaine distribution operation in which all sales may be consummated within hours of delivery. See United States v. Greany, 929 F.2d 523, 525 (9th Cir. 1991)(nearly two-year old information on marijuana growing operation upheld, staleness evaluated in light of particular facts of case and nature of criminal activity and property sought); United States v. Dozier, 844 F.2d 701, 707 (9th Cir. 1988)(marijuana cultivation is long-term crime; even "substantial" time lapse not controlling on staleness).

In this case, the magistrate judge at the suppression hearing and the district judge actually evaluated the affidavit de novo, and independently concluded there was insufficient probable cause. We hold that, looking at the

totality of the evidence, there was ample probable cause to support the issuance of a warrant, particularly when granting appropriate deference to the issuing magistrate. The pattern of electrical usage was unusual, not because it was high and because it was steady, showing very little seasonal variation. The anonymous letters were very specific and much of the information in the letters was corroborated, supporting their overall accuracy. In addition, there was evidence of activity consistent with a marijuana growing operation, including the purchase of the growing supplies and the ventilator rotating in calm air.

IV

Because we find that there was sufficient probable cause in the affidavit to support the issuance of the warrant, we need not address the issue raised by the

government of reliance on the good faith exception to the exclusionary rule. Therefore, we REVERSE the district court, and REMAND for further proceedings in conformity with this opinion.

No. 92-6207/08

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
KEVIN KEITH THOMAS,	)	
	)	
Defendant-Appellee.	)	

BEFORE: RYAN and BOGGS, Circuit Judges; and ROSEN,[11] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc,

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[11] Hon. Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation

the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

Leonard Green, Clerk

ANONYMOUS LETTER NO. 1

Dear Sirs:

ABC News just featured a 46-state bust of indoor marijuana growers (mentioning a check of utility bills); "48 Hours" recently featured the use of aerial infra-red surveillance in arresting an indoor grower.

Here's a tip from a disgruntled customer who has seen it all fist hand: three 1000 watt halide lights with may HUGE marijuana plants underneath and several flourescents [sic] over literally HUNDREDS of small cuttings ready to sell and transplant! Anyone care to see for yourself?

Kevin Thomas
700 Adella Av
Sevierville, TN

His brother Barry, who with his wife was arrested in Knoxville last spring with 100 plants growing in a bedroom, helped Kevin cultivate and harvest a BUMPER outdoor crop this fall from the islands of Douglas Lake; they are both holding now, and Barry is sure to hang lamps again as soon as he's released from probation.

Kevin is about to harvest his "Basement Bud" and laugh all the way to the bank AGAIN. He thinks he lives in Mayberry RFD: "What are they gonna do...send Barney out here with a bullet?

Most assuredly,

X

cc: Sevier County Sheriff
Tennessee Highway Patrol
Tennessee Bureau of Investigation
Federal Bureau of Investigation
United States Marshals Service
Drug Enforcement Agency

ANONYMOUS LETTER NO. 2

Barry and Angie are at it again, this time in the workshed at their residence on Beverly Hills Dr. in Sevierville; this house is owned by Barry's brother

Kevin Thomas
400 Adella Av.
Sevierville, TN

Kevin is conspiring with his brother and sister-in-law to again cultivate marijuana, just after Barry and Angie were released from unsupervised probation for a November 1988 simple possession conviction resulting from a May 1988 arrest for cultivation (see enclosed newspaper clippings)---the pair even received record expungement after the successful completion of their probation period (11 months 29 days), during which

time (the summer of 1989) they boldly cultivated marijuana on the islands of Douglas Lake with Kevin Thomas!

Kevin also grows pot in the basement, from which Barry and Angie obtained the cuttings to maintain their continuing criminal enterprise. Since Kevin owns the property and they succeeded in bringing in a record harvest last summer---despite the fact they were caught red-handed in Knoxville---Barry and Angie feel they can break the law with impunity.

These criminals' bravado will suffice to do them in should this tip prompt you gentlemen to initiate an investigation, since their deluded egomania ignores such facts as:

the workshed is
unattached to their
home, placing it
outside the curtiledge

[sic] of the residence-
-permission from their
neighbor to approach
the same might well
result in the detection
of the pungent of
flowering (an officer
with experience and/or
a trained canine), or
hear the hum of high
intensity discharge
lamp ballasts in
operation (tax
assessors need no
permission to
tresspass) [sic];
they have plans to
install an air
conditioner, which
would be in operation

during freezing outside
temperatures;
there is an air turbine
installed upon the
workshed roof to
evacuate heat and
moisture, turning at
high speeds even in the
calmest of winds and in
freezing temperatures;
black plastic clearly
covers the window to
prevent the bright
lights from leaking
through;
the electricity
consumption is much
higher than normal for
the area, and much
higher than last year
at the same location

(Kevin shut down this operation site immediately upon Barry and Angie being arrested), attributable only to the use of grow lights;
infra-red heat detection aerial surveillance will show high levels of heat loss from a supposedly unoccupied building, which can only result from hot grow lights and transpiration of growing plants;
after transplanting and harvesting, they must dispose of waste materials (unmarketable

stems and root
systems)--while they
are wise enough not to
put these materials out
for garbage pickup,
they don't think they
are "hot" enough to be
followed while
transporting the same
and depositing it in a
landfill or, more
likely, in a commercial
dumpster;
their hydroponic medium
of choice is Pro-Mix BX
soiless [sic] mix,
purchased at Knox Seed
Supply in Knoxville,
packaged in black 80
lb. bales---these are
large containers which

must be carried in plain sight from their auto, across their yard, and into their workshed for use; ground surveillance would show Kevin also entering the "greenhouse," which should not only result in another conviction but also in another warrant to search his primary residence and charge his wife for their basement garden--forfieture (sic) of both homes necessarily follows.

Surely you have additional methods to collect evidence to show probable cause for a search warrant, and just as surely you know how best to compile the same to make it stand up in court so that these criminals' civil liberties are not infringed upon in the process.

Their first harvest since Barry, Angie, and their Great Danes moved in is expected no sooner than the middle of February and no later than late March: they expect to harvest every three months after that.

Good hunting!

(2)

Supreme Court, U.S.
FILED
MAR - 4 1994
OFFICE OF THE CLERK

No. 93-1218

In the Supreme Court of the United States

OCTOBER TERM, 1993

KEVIN K. THOMAS AND BARRY D. THOMAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

APP

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1218

KEVIN K. THOMAS AND BARRY D. THOMAS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order suppressing evidence seized from two residences pursuant to search warrants.

1. On January 6, 1992, petitioners were charged in separate informations filed in the United States District Court for the Eastern District of Tennessee with manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1) and 842(b)(1)(B). Petitioner Kevin Thomas was also named in a criminal forfeiture count seeking to forfeit to the government all of his interest in two properties because of the manufacture of marijuana there.

Petitioners moved to suppress evidence seized at both properties pursuant to two search warrants. On September 8, 1992, following the recommendation of the magistrate, Pet. App. 2a-37a, the district court suppressed the evidence seized on the ground that the search warrants were not supported by probable cause, Pet. App. 38a-51a. The court also refused to apply the good faith exception to the exclusionary rule set forth in *United States* v. *Leon*, 468 U.S. 897 (1984).

The court of appeals reversed. Pet. App. 52a-76a. The court found that there was sufficient corroboration for two anonymous letters that were used as part of the basis for the probable cause that was proffered to support the issuance of the warrants.

2. Petitioners contend that the court of appeals improperly allowed corroboration of an anonymous letter by public innocent details rather than by corroboration of "future actions of third parties, ordinarily not easily predicted." Pet. i. Whatever the merits of that contention, it is not ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits, their current claim will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contention to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly,

review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1994

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.